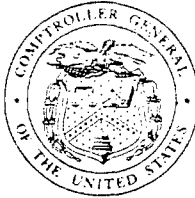


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

10,012

FILE: B-192792

DATE: April 30, 1979

MATTER OF: Abbott Power Corporation

2.

DIGEST:

1. Bid which tenders component manufactured in Canada, but states \$0.00 for duty and 0 percent for cost of foreign articles is responsive, since it has taken no exception to IFB.
2. Bid that stated \$0.00 in place provided in IFB for statement of amount of duty in offer is not nonresponsive, since bids were solicited on duty-free basis and IFB clause only required statement of amount included in offer to cover duty.
3. Since bidder proposed in bid to use component manufactured in Canada, designation of 0 percent for cost of foreign articles was incorrect; however, that does not change bidder's obligation to furnish domestic end product, since offer of foreign component is not incompatible with offer of domestic end product.
4. Where bidder did not submit responsibility information required by "Qualifications" clause with bid, bidder could properly submit data subsequent to bid opening.
5. Since descriptive literature requirement did not call for description of reactor housing, bidder cannot be faulted for failing to provide descriptive information in that regard.
6. Where drawings requested by descriptive literature clause are immaterial, bid submitted without complete drawings may be considered notwithstanding language of clause might be read as making it imperative that bid be rejected.

[Protest of Contract Award] ~~005143~~

7. Statement in bid that bidder uses named companies' components is substantial compliance with IFB requirement that bidder provide list of manufacturers of components.
8. Where language in bid does not limit application of descriptive data, such data must be considered in determining responsiveness of bid.
9. Intention of bid is determined from reasonable interpretation of its entire contents, including descriptive literature. Thus, deficiencies in descriptive literature indicating an intent on part of bidder not to conform to requirements of IFB rendered bid nonresponsive.
10. While there was no evidence to support agency position that deviations in bid did not have significant effect on price, quantity, quality or relative standing of bidders so as to warrant waiver of deviations, situation appears to be governed by rule that deliberate exceptions to invitation requirement cannot be waived as trivial or minimal.

Abbott Power Corporation (Abbott) has protested under invitation for bids (IFB) DACW57-78-B-0100 the award of contracts to Golden Gate Switchboard Company (Golden Gate) and General Electric (GE) for schedules "B" and "C," respectively.

IFB section B-6 provides that each offeror is to furnish information concerning the amount included in its offer to cover applicable duty for articles, materials or supplies of foreign origin and to indicate the percentage of the cost of all articles, materials and supplies incorporated into the end product which are of foreign origin. For the duty, Golden Gate stated "\$0.00" and for the percentage of cost of foreign articles "0%." Abbott contends that the bid should be rejected as nonresponsive because the statements are inconsistent with the tender

in the bid of Trench Electric Limited (Trench) reactors which are manufactured in Canada. Abbott's bid also included the Trench reactor and Abbott states that Trench's quotation to it and Golden Gate included the duty. In its bid, Abbott provided \$2,632 for duty and 15 percent for the cost of foreign articles which also included disconnect switches from Italy.

" * * * the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive."
49 Comp. Gen. 553, 556 (1970).

Golden Gate has taken no exception to the IFB and it is therefore responsive.

The IFB contains a "DUTY FREE ENTRY FOR CERTAIN SPECIFIED ITEMS" clause which provides that no amount is included in the contract price on account of duty with respect to those supplies that are specifically identified in the schedule as supplies to be accorded duty-free entry and makes provision for the issuance of duty-free entry certificates for those items. Abbott contends that the Government needs to know that the amount of the duty exceeds \$1,000 in order to include the duty-free entry clause in the contract and that Golden Gate's failure to specify an amount rendered its bid nonresponsive. However, page E-6 of the IFB schedule stated, "All supplies to be furnished by this contract are duty free." Thus, a determination was made prior to the issuance of the IFB that all supplies would be duty free. Moreover, section B-6 only required the amount included in the offer to cover duty to be stated.

Therefore, where the bidder included none in the bid price, there was no requirement to separately state it under B-6. While Abbott states that Trench quoted prices including duty, Golden Gate has represented in its bid that it did not include any duty and it is impossible to determine from its bid that it did. Accordingly, we are unable to conclude that the bid was nonresponsive. Further, if it did include the duty in the bid price, Abbott was not prejudiced, since Golden Gate's price (with supposed duty included) is still lower than Abbott's without the duty.

Since Golden Gate has proposed in its bid to use the Trench reactor, the designation of 0 percent for foreign supplies in section B-6 of its bid was incorrect. However, such information apparently is related to whether the end product being furnished is domestic or foreign under the Buy American Act. Golden Gate in the Buy American certificate in the bid certified that it will supply a domestic source end product. In this regard, our Office has held on several occasions that where a bidder or offeror excludes no end products from the Buy American certificate in its bid and does not indicate that it is offering anything other than domestic source end products, the acceptance of the offer, if otherwise acceptable, will result in an obligation on the part of the bidder to furnish domestic source end products. McKenna Surgical Supply, Inc., B-186895, April 15, 1977, 77-1 CPD 261; Thorsen Tool Company, B-188271, March 1, 1977, 77-1 CPD 154; Becker Instruments & Photographic Optics, B-185411, July 14, 1976, 76-2 CPD 43; B-174850, April 6, 1972. The fact that Golden Gate may have mistakenly stated that no foreign articles were involved does not change that obligation. An offer of a foreign component is not incompatible with an offer of a domestic end product. A domestic end product is one in which the cost of components manufactured in the United States exceeds 50 percent of the cost of all the components. General Provision 14, "Buy American Act."

Abbott's next contention is that Golden Gate's bid is nonresponsive because it failed to indicate, as required by the IFB "Qualifications" clause, whether Golden Gate is now or has ever been engaged in any contract or other work similar to that proposed in the IFB. The Corps of Engineers

takes the position that this information relates to responsibility of a contractor and can be submitted subsequent to bid opening. In support of this position, the Corps cites Dubie-Clark Company, Patterson Pump Division, B-189642, February 28, 1978, 78-1 CPD 161. Abbott attempts to distinguish Dubie-Clark on the basis that there the bidder submitted some evidence in its bid of having experience in similar contracts and, therefore, was responsive to the informational requirement of the IFB.

As indicated in Dubie-Clark, bidder qualification is a matter of responsibility. Responsibility pertains to a bidder's capacity to perform the contract, whereas responsiveness pertains to its obligation to perform the contract. See 49 Comp. Gen., supra. In James E. McFadden, Inc., B-186180, June 17, 1976, 76-1 CPD 393, where the bidder did not submit the required responsibility information with its bid, we held that the bidder could properly furnish the data pertaining to its responsibility subsequent to bid opening. Accordingly, we conclude that Golden Gate's failure to supply the "Qualifications" information with its bid was not a basis for rejection of the bid.

The "Descriptive Literature" clause in the IFB required bidders to provide:

"Drawings, sketches, or catalog cuts showing general arrangement and approximate overall dimensions of the current limiting reactors with housings, transition compartments, and adjacent disconnect switches, and neutral grounding cubicles for main generators and fish water generators."

The Corps admits that Golden Gate did not submit drawings showing the approximate overall dimensions of the reactor housing and transition sections. However, the Corps considers the omission a minor deviation, since from the rest of the information furnished it was able to determine that the equipment will interface with the electrical equipment to be furnished by other suppliers and meet the approximate and limiting dimensions shown in the IFB.

Abbott contends that the Golden Gate bid should have been rejected as nonresponsive because of the omission, since the "Descriptive Literature" clause states:

"Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Offers will require rejection of the offer."

Abbott states that the fact that the drawings are immaterial is of no consequence in the face of the quoted provision. Further, Abbott states that the missing drawings created an ambiguity as to what Golden Gate is going to supply as a reactor housing.

On the latter point, the literature requirement did not call for a description of the reactor housing. Thus, Golden Gate cannot be faulted for having failed to provide descriptive information in that regard. Kaiser Aerospace & Electronics Corporation, B-190148, February 14, 1978, 78-1 CPD 124; 48 Comp. Gen. 465 (1969). Moreover, as to a provision requiring the rejection of a bid for failing to submit data requested in the IFB, we have stated:

"It must be recognized, however, that an automatic rejection of a bid because of a failure to conform to a purely technical or overliteral reading of the stated requirements may be as arbitrary as a waiver of non-responsiveness to a material and substantial requirement. It is to be presumed that descriptive material or data required to be furnished by bidders with their bids is needed for some purpose relevant to the proper evaluation of the bids; if the purpose is reasonably clear and appears to be substantially met by the material furnished, we do not believe that the interests of the Government or of competing bidders require that a bid be rejected because of deficiencies merely of form."
39 Comp. Gen. 595, 597 (1960).

Thus, there are situations where bids may be considered when they do not comply with the literal requirements of the "Descriptive Literature" clause notwithstanding that the language of the clause might be read as making it imperative that they be rejected. See, for example, Sulzer Bros., Inc., and Allis-Chalmers Corporation, B-188148, August 11, 1977, 77-2 CPD 112.

Abbott further contends that Golden Gate's bid is nonresponsive for failure to provide a list of manufacturers of component materials also required by the "Descriptive Literature" clause. However, we view the statement in the Golden Gate descriptive literature that it will use General Electric components, with the exception of the reactor which will be furnished by Trench Electric Limited, as substantial compliance with that requirement.

In view of the foregoing, we do not object to the award of schedule "B" to Golden Gate. Accordingly, that aspect of the protest is denied.

While Abbott contends that GE's bid is nonresponsive for several reasons, for reasons which will become apparent later we will only discuss Abbott's contentions regarding alleged qualifications to General Electric's bid by materials contained in the general descriptive data provided under the Descriptive Literature clause for schedules "C" and "D."

Abbott contends that GE will not: (1) submit drawings which conform to the requirements of SC-3.3 of the IFB, (2) submit process tracings as required by SC-3.8 of the IFB, (3) furnish seven operation and maintenance manuals required by SC-3.9 of the IFB, and (4) provide the required number of paint coats for the equipment. Finally, Abbott contends that General Electric is taking exception to the requirement of section TP3-2.2 of the IFB relating to the anchoring of equipment and providing a steel floor for the equipment.

The Government argues that DAR § 2-202.5 provides, unless it is clear from the bid or accompanying papers that it was the bidder's intent to qualify

the bid, unsolicited descriptive data should be disregarded." Thus, the Government reasons that the descriptive data referred to by the protester is unsolicited to the extent that it was not required to evaluate the invitation for bids and the material submitted specifically for this procurement complied with the requirements of the solicitation. The Government further states that General Electric has not qualified its bid in any form or expressed any intent not to be bound by the terms and conditions contained in the IFB.

In this regard, we have held that absent language in the bid limiting application of descriptive data, such data must be considered in determining the responsiveness of a bid. See B-163947, July 17, 1968. Thus, the material contained in GE's general descriptive data must be considered and such data appears to qualify GE's bid so that upon acceptance by the Government GE could not be required to furnish items inconsistent or different from the items described in such data.

However, we must take exception to the Government's argument that the descriptive data referred to was unsolicited, as required by DAR § 2-202.5. Section 4 on page C-3 of the IFB states, in pertinent part, as follows:

"4.1 Descriptive literature as specified in this invitation for offers must be furnished as a part of the offer and must be received before the time set for opening offers. The literature furnished must be identified to show the item in the offer to which it pertains. The descriptive literature is required to establish, for the purposes of offer evaluation and award, details of the products the offeror proposes to furnish as specified in 4.3 below * * *.

"4.2 Failure of descriptive literature to show that the product offered conforms to the specifications and other

requirements of this Invitation for Offers will require rejection of the offer. * * * Offers will be evaluated strictly on the basis of the information submitted with the offer. If offerors submit standard drawings and/or standard published descriptive data for their product, any modification required and intended by them to show compliance of the offer with the requirement of the specifications shall be clearly indicated thereon, and any inapplicable description or data shall be deleted * * *."

Our Office has held that the question of responsiveness concerns whether a bidder has unequivocally offered to provide the requested item in total conformance with the terms and specifications of the solicitation. Sentinel Electronics, Inc., B-185651, June 24, 1976, 76-1 CPD 405. The descriptive literature clause included in the present solicitation provided that the data was required to establish details of the item offered and, further, that failure of the data to show conformance with the specifications would require rejection of the bid. Our Office has held that the submission of descriptive data, where the data is used for bid evaluation, is a matter of responsiveness and where the data does not clearly show conformance with the specifications rejection of the bid is required. See Austin-Campbell Co., B-189032, September 28, 1977, 77-2 CPD 236; A.L. Leftheriotis Ltd., B-190720, March 30, 1978, 78-1 CPD 251.

In the present case, the data submitted by GE indicates that it intended to (1) furnish "D" size (22" x 32") drawings rather than 28" x 40" required by the solicitation. While the Government argues that GE, on page 2 of the materials contained in the "Descriptive Data for C&D," pledges to provide the necessary drawings, General Electric merely states that arrangement and floor plan drawings and elementary and wiring connection diagrams will be furnished. No mention is made of the type of drawings that will be furnished. Data submitted by GE also

indicates that it intended to (1) furnish one sepia reproducible rather than tracings on permanent translucent, matte surface two sides, polyester base film, (2) five operation and maintenance manuals rather than seven and (3) furnish only one coat of paint for the equipment rather than two coats. Finally, paragraph 3-2.2 of the technical provisions states:

"Cubicles shall be designed for bolting to a concrete floor. Circuit breaker units, including adjacent auxiliary compartments if furnished, and disconnect switchgear, shall be supplied with iron foundations complete with drilled holes for anchoring and grouting as necessary and with hardware and drilling to match the mounting provisions of the equipment. Channel iron foundations for the metal-clad breaker switchgear assemblies shall be continuous for each shipping section, and shall be designed for flat mounting and separate installation below finished floor elevation. These foundations shall contain drilled plates, handholes and vents as necessary to allow accurate and secure anchoring, leveling and grouting into place. Channel or angle iron foundations for the station-type circuit breakers and disconnect switch assemblies shall be designed for flat mounting on top of the finished floor."

In its General Construction Specification, page 2, GE indicates that "Switchgear supports for anchoring and for providing proper alignment of the switchgear units will be furnished by others for installing in the floor." Six pages later on a drawing entitled "Alternate Method of Lifting" there is a note in the center of the drawing which states "ALL FLOOR STEEL IS TO BE FURNISHED BY PURCHASER" and we find the same notation on a drawing, on page 29, entitled "Installation Information."

In regard to the Government's statement that GE expressed no intent to deviate from the contract specifications, this might be significant had GE not taken specific exception to the above requirements. In Interad, Ltd., B-182717, June 16, 1975, 75-1 CPD 363, where the invitation required the furnishing of maintenance-operation instruction manuals as well as a 1-year warranty for the equipment to be furnished and the bidder took no exception to the specifications, we held that the descriptive literature clause did not require a statement with each bidder's descriptive literature that it would furnish the manuals and the warranty. Our rationale was that "specifications" is generally understood to mean the description of the technical requirements of a product rather than the terms and conditions under which bids are submitted and the rights of the parties are defined. Also, since the bidder did not take exception to the requirements for the manuals and warranty, the bidder would presumably be bound to furnish them once he signed the contract.

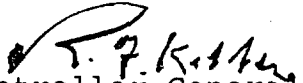
However, in the present case, while admittedly the failure to provide the required drawings, process tracings and instruction manuals does not affect compliance with the technical requirements of the solicitation, unlike the bidder in the Interad case, GE took exception to these requirements. This being the case, there is no showing that GE intended to conform to these terms and conditions of the invitation, the intent of the bid being determined from a reasonable interpretation of its entire contents, including any descriptive literature. Electron Research, Inc., B-179076, January 28, 1974, 74-1 CPD 35. In this regard, we have also held that even a blanket statement of compliance with the specifications is not sufficient to cure specific exceptions to specification requirements. A. L. Leftheriotis, Ltd., supra. Also, see B-175329, June 28, 1972. Concerning GE's failure to provide the steel floor and anchoring, as well as its failure to provide a second coat of paint for the equipment, it would appear that these deviations relate to the technical requirements of the specifications and GE's descriptive data clearly shows that it has no intent to

conform to these requirements. Accordingly, we must conclude that because of the above deficiencies, GE's bid must be considered to be nonresponsive. See Abbott Power Corporation, B-186198, January 7, 1977, 77-1 CPD 13.

Finally, the Government argues that the deficiencies do not warrant rejection of GE's bid since the deviations have an insignificant effect on price, quantity, quality or relative standing of the bidders. However, the Government has furnished no evidence in support of this argument and, in the absence of such evidence, we can only conclude that the deviations are not insignificant or trivial. But in any event, the situation appears to be governed by the rule that deliberate exceptions to an invitation requirement cannot be waived as trivial or minimal. B-155827, February 25, 1965; B-156842, June 11, 1965; B-159725, December 23, 1966; 47 Comp. Gen. 496 (1968); B-164846, September 3, 1968; B-165217, November 13, 1968.

As a result, it is not necessary for us to consider Abbott's other contentions that GE was not responsive.

While, in the circumstances, we would ordinarily recommend the termination of the contract awarded to GE for schedule "C," since the Corps is restricted to a tight timeframe and this would result in a serious setback to the interfacing and coordination of the various contracts issued for other phases of the overall dam power project, we do not believe it would be in the best interests of the Government for such a recommendation to be made here.


Deputy Comptroller General
of the United States